

STATE OF CALIFORNIA  
ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:	) Docket No. 01-AFC-08
	)
Application for Certification,	) STAFF COMMENTS
for the OCOTILLO ENERGY PROJECT, PHASE 1	) RE: QUALIFICATION
by Ocotillo Energy LP	) FOR EXPEDITED
	) PROCESS

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## INTRODUCTION

On June 22, 2001, the Commission found that the application for certification (AFC) from Ocotillo Energy LP (applicant) meets the informational requirements for a four-month process pursuant to Public Resources Code section 25552 and, therefore, accepted the AFC as complete. Within 25 days of acceptance, the Commission or a Committee overseeing the AFC process must determine whether the application qualifies for an expedited decision pursuant to Section 25552. (Pub. Resources Code § 25552 (b)(2).) As explained below, staff recommends that the Committee in this case find that the application does not qualify for the four-month process and recommends that the AFC be processed under the conventional 12-month process.

## CRITERIA FOR QUALIFICATION

Section 25552 was enacted to help ensure that powerplants could come on line quickly to address the energy emergency. To that end, this section allows for an expedited (four-month) decision on simple cycle thermal powerplants and related facilities that can be put into service on or before December 31, 2002. Those projects are nevertheless subject to certain restrictions or criteria contained in section 25552,

subsections (d) and (e). Staff has referred to both subsections in deciding whether to recommend qualification of the Ocotillo project for an expedited (four-month) decision.

Section 25552(d). Section 25552(d) pertains to findings the Commission must make if it is to grant a license to a simple cycle powerplant in four months. Even though these criteria apply to the final decision, there should be evidence for the 25-day determination that shows the application is likely to meet these criteria and, therefore, qualifies for an expedited decision in four months.

According to Section 25552(d), a qualified application is entitled to a decision granting the license in four months if the Commission can make the following findings: 1) the powerplant is not a major stationary source or a modification to a major stationary source, as defined by the federal Clean Air Act, 2) the powerplant will be equipped with best available control technology, in consultation with the local air district and the State Air Resources Board, 3) the powerplant will not have a significant adverse effect on the environment or the electrical system, and 4) the applicant has contracted with a general contractor and has contracted for an adequate supply of skilled labor to construct, operate, and maintain the powerplant. (Pub. Resources Code § 25552(d).)

Section 25552(e). Public Resources Code section 25552(e) states, “In order to qualify for the procedure established by this section, an application shall satisfy the requirements of Section 25523 [regarding the contents of the Commission’s written decision], and include a description of the proposed conditions of certification” that will, among other things, “[a]ssure that the project will not have a significant adverse effect on the environment”, “[a]ssure protection of public health and safety”, and “[r]esult in compliance with all applicable federal, state, and local laws, ordinances, and standards.” (Pub. Resources Code § 25552(e)(1)—(3).) Subsection (e) also requires a “reasonable demonstration” that the thermal powerplant will be in service before December 31, 2002,

and evidence that the applicant will enter into an agreement with the Commission to terminate the project in three years of certification or convert it to a cogeneration or combined cycle facility.

Section 25523, referenced in Section 25552(e), describes what the Commission's written decision must contain, such as "[s]pecific provisions relating to the manner in which the proposed facility is to be designed, sited and operated in order to protect environmental quality and assure public health and safety." Staff interprets the reference to Section 25523 to mean that an application qualifies for an expedited decision if it contains sufficient evidence to support specific conditions of certification protective of the environment and the public's health and safety and supportive of conformity findings regarding applicable laws, ordinances, and standards.

Following is a discussion of four key criteria that staff believes the Ocotillo project should meet to qualify for an expedited license in accordance with Section 25552, subsections (d) and (e). Three other criteria are also briefly discussed in keeping with the subsections. Discussion of the criteria and whether the application qualifies based on the criteria is followed by a brief discussion on timing issues and whether Executive Orders D-26-01 and D-28-01 allow for a waiver of any restrictions in the four-month process.

1) Major Stationary Source. The first criterion under Section 25552(d) restricts the four-month process to simple cycle thermal powerplants that are not major stationary sources as defined by the federal Clean Air Act. The Ocotillo project is proposed for a site in Riverside County in the Salton Sea Air Basin. Because the Salton Sea Air Basin is under the jurisdiction of the South Coast Air Quality Management District, the project is subject to the District's Rule 1302(p), which is part of the state implementation plan (SIP) approved by the U.S. Environmental Protection Agency (EPA). As part of an approved

SIP, the rule has been approved to implement the requirements of the federal Clean Air Act for an area designated as nonattainment.

Under Rule 1302(p), a “major polluting facility” is synonymous with a “major stationary source.” The District deems a source to be a major source if it exceeds any of the Rule’s specified pollutant thresholds. Following is a table showing the proposed project’s emissions, based on information in the AFC rounded to the nearest ton, as compared with the District’s thresholds for a major source:

	<b>NOx</b>	<b>VOC</b>	<b>CO</b>	<b>PM10</b>	<b>SO2</b>
SCAQMD Major Source Threshold (t/yr)	25	25	100	70	100
Octotillo Emissions (t/yr)	416	22	228	78	9
Exceeds Threshold?	<b>Yes</b>	<b>No</b>	<b>Yes</b>	<b>Yes</b>	<b>No</b>

Based on the District’s major-source thresholds as shown above, the proposed project is a major stationary source in that it exceeds the pollutant thresholds for NOx, CO, and PM10.

If we turn directly to federal regulations implementing the federal Clean Air Act with respect to state implementation plans in general for nonattainment areas, we find a more general definition of “major stationary source.” That definition defines “major stationary source” to include “[a]ny stationary source of air pollutants which emits, or has the potential to emit 100 tons per year or more of any pollutant subject to regulation under the Act ....” (40 C.F.R. § 51.165(a)(1)(iv)((A)(1) Even under this less stringent definition, the Ocotillo project, projected to emit 416 tons of NOx per year based on information in the

AFC (rounded to the nearest ton), is a major stationary source that is not eligible for a license in four months under the terms of section 25552.<sup>1</sup>

Thus, based either on the District's rule for "major polluting source" implementing the federal Clean Air Act or on a general, less stringent federal regulation for "major stationary source," the proposed project does not meet the first criterion for a license under section 25552.

2) Best Available Control Technology (BACT). The Applicant is proposing NOx and CO emission levels of 9.0 ppm and 7.2 ppm (@15% O2), respectively. (AFC, p. 5.2.6.) The South Coast Air District, the State Air Resources Board, and the U.S. Environmental Protection Agency all believe that BACT for NOx emission for a simple-cycle turbine should be 5 ppm. Unless there is convincing evidence showing that this level cannot be met, it is likely to be the BACT level applicable to this project. To date, any evidence the applicant has presented to the District to determine a different BACT level has not succeeded in changing the agencies' opinions about 5 ppm. In addition, the applicant has not proposed the installation of an oxidizing catalyst to achieve the current CO BACT level of 6 ppm at 15% O2. Given the discrepancy between what the applicant is proposing and what the District is most likely to determine to be BACT for this project, the Commission is not likely to be able to make the BACT finding required for a license in four months. Moreover, there is no evidence that the applicant is likely or willing to consider changing the project's emissions profile. The proposed project is, thus, not likely to meet the second criterion for a license under Section 25552.

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<sup>1</sup> There is another definition for "major stationary source" relevant to that part of a state implementation plan to prevent significant deterioration of air quality where an area is in attainment for one or more regulated pollutants. The proposed Ocotillo site is proposed in an area that is in attainment for NO2. If we look at the federal definitions relevant to state plans for areas in attainment, "major stationary source" is defined to include "any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the

3) Significant Adverse Environmental Impact. Under Section 25552(d), the Commission may issue a decision granting a license in four months if it finds, among other things, that the project will not have a significant adverse effect on the environment. Under subsection (e), the application “shall satisfy the requirements of Section 25523 [contents of the final decision]” and describe conditions of certification that will, among other things, ensure environmental protection from the project. This discussion focuses on evidence in the AFC that is consistent or inconsistent with such findings and conditions of certification.

Two criteria for indicating whether a project will result in significant adverse impacts are whether the project will provide sufficient offsets to meet its obligation under applicable rules and whether it will be sufficiently controlled to meet BACT levels. Regarding the first criterion, the applicant has yet to identify offset sources (except for VOC) to meet the offset requirements applicable to the project under the District’s rules. Instead, the AFC lists several possible methods for obtaining offsets, but provides little information on which method(s) will be used. Where offsets are unavailable, the section does allow an applicant to pay an “air emissions mitigation fee” to the district to mitigate emissions from the project. (Pub. Resources Code § 25552(e)(6).) There is no evidence, however, that the district has in place a program to handle such fees in time for an expedited decision or that offset sources are available for the district to purchase with the applicant’s mitigation fees in accordance with Health and Safety Code Section 44275 et seq. (authorizing and describing the program). In any event, there is no evidence of sufficient offsets for this project.

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Act ....” (40 C.F.R. § 51.166(b)(1)(I)(b).) Even under this definition, the Ocotillo project with a projected 416 tons of NOX per year, is a “major stationary source.”

Regarding the second criterion, as previously discussed, the current project is not likely to meet BACT for NO<sub>x</sub> or CO. Given the lack of offsets, together with the applicant's proposed emissions levels for NO<sub>x</sub> and CO in excess of likely BACT levels, significant environmental harm is likely to result from the powerplant as proposed.

In addition to the offset and BACT issues, there are related issues over the possible significant effect of project emissions on three scenic areas of concern. They are the Joshua Tree National Park (east of the proposed site), the Santa Rosa National Scenic Area (south of the proposed site), and the San Geronio Wilderness (west of the proposed site). The National Parks Service has already expressed concern over project emissions adversely affecting Joshua Tree National Park. The Park is of particular concern due to it being in an area that is not in attainment for the National Ambient Air Quality Standard for ozone and the potential for visibility impacts from the proposed project directly and cumulatively with other projects.

4) Compliance with Applicable Laws, Ordinances, and Standards. Section 25552(e) requires a qualifying application to contain data that "satisfy the requirements of Section 25523." One of the requirements of Section 25523 is a finding on whether the project complies with all applicable laws, ordinances, and standards. Subsection (e) also requires a description of conditions of certification that will, among other things, result in compliance with all applicable laws, ordinances, and standards. If the project is not likely to comply with BACT and offset requirements, based on information to date, it is thereby unlikely to comply with federally enforceable rules in the SIP.

With no evidence at this time showing that there will be sufficient mitigation or offsets for project emissions, the Commission could not make the required finding of no significant adverse impact on the environment as required for a license in four months. Thus, with respect to at least four findings that must be made to grant a license under

Section 25552, as discussed above, the evidence to date does not support the findings, and there is no indication that additional evidence is forthcoming in time for a final decision in four months. For these reasons, staff recommends that the Committee's determination be that the Ocotillo application does not qualify for an expedited license in four months under Section 25552.

5) Other Criteria. This discussion focuses on three remaining criteria. One regards a labor contract, which is required for a final decision. The other two have to do with the on-line date over which there is no dispute and an agreement to terminate in three years or convert to a cogeneration or combined cycle facility.

Skilled Labor Contract. Section 25552(d) requires a finding that "the applicant has contracted with a general contractor and has contracted for an adequate supply of skilled labor to construct, operate, and maintain the thermal powerplant." Although there is no evidence in the AFC of such contracts, there is also no indication that the applicant is unable or unwilling to enter into the required contracts in time for a final decision. Moreover, the lack of a contract while the case is pending raises no issues on environmental impacts, public health and safety, or compliance with applicable laws, ordinances, and standards, so long as the contract is available in time for an expedited final decision. Consequently, this criterion does not affect staff's recommendation.

On-Line Date. Section 25552(e) requires a "reasonable demonstration that the thermal powerplant and related facilities, if licensed on the expedited schedule provided by this section, will be in service before December 31, 2002." The project is proposed to be on line for the summer of 2002. (AFC, p. 2-1.) Staff does not take issue with the applicant's proposal to be on line as stated in the AFC and notes that it meets the statutory deadline for expedited projects under this section.



Agreement to Terminate or Convert. The final criterion for discussion here is also in Section 25552(e). The section requires the AFC to describe conditions of certification that will result in an agreement with the Commission that the project will either terminate in three years or be replaced in three years with a cogeneration or combined cycle facility that complies with all applicable requirements for BACT and offsets. Staff notes that the applicant plans to convert the simple cycle project into a combined cycle facility within three years and, thus, meets this criterion of the section. (AFC, p. 1-1.)

Although the Ocotillo application does meet certain of the criteria relevant to qualification for an expedited license under Section 25552, there is substantial evidence that it is not likely to meet other key criteria. Based on those criteria, staff recommends that the Committee find that the Ocotillo application does not qualify for an expedited license under Section 25552.

## **TIMING AND THE EXECUTIVE ORDERS**

A. Timing of Documents. The four-month process under Section 25552 requires interested agencies to provide their comments, opinions, and determinations in approximately 65 days from the date of acceptance in time for staff's analysis, hearings, and the proposed decision. Now, almost a month into the process, there is evidence of significant issues over offsets, BACT, and potential impacts to a national park, a national scenic area, and a designated wilderness in the vicinity of the proposed project. Although the timing of documents is not a specific criterion for qualification under Section 25552, it is a practical consideration that goes to the significance of the outstanding issues and whether to recommend the application does or does not qualify for an expedited process. As a practical matter, the lack of evidence at this time to support at least four key findings that must be made for an expedited license under

Section 25552 strongly suggests that the application is better suited for the 12-month process. Even so, staff would do its best to process the application expeditiously, but without the constraint of having to prepare an analysis and testimony in time for a four-month decision by the Commission.

B. Executive Orders. The Emergency Services Act gives the Governor broad authority to “suspend ... the orders, rules, or regulations of any state agency ....” (Govt. Code § 8571.) As a result, Executive Order D-26-01 gives the Commission the discretion to suspend restrictions in Section 25552 “to the extent that they would prevent, hinder, or delay the prompt mitigation of the effects of this emergency.” Executive Order D-28-01 directs agencies implementing certain executive orders, including D-26-01, to “follow substantive requirements designed to achieve environmental protection and the protection of public health and safety to the maximum extent consistent with the prompt execution of those executive orders.” Although these orders allow for suspension of state laws, the Governor has no authority to suspend federal law. The rules of the District, therefore, having been approved by EPA to implement requirements of the federal Clean Air Act, could not be suspended under these orders. Those rules pertain to BACT and offset requirements.

Assuming these orders apply to the proposed application, staff would not recommend suspension of the major-stationary-source restriction in this instance. The project has critical issues regarding BACT, offsets, and potential environmental impacts. If there were no such issues and the only impediment to an expedited license was the restriction that the project not be a major stationary source, staff would consider supporting a suspension of the restriction. That is not the case here and, for that reason, staff recommends against suspending the restriction where such critical issues

as BACT, offsets, and potential adverse environmental impacts argue against granting a license in four months.

## **CONCLUSION**

Staff does not believe that this project meets the criteria for an expedited 4-month AFC review and, therefore, recommends that the Committee process this AFC under a conventional 12-month process. Even so, staff would work diligently to process the application as expeditiously as possible.

DATED: July 10, 2001

Respectfully submitted,

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